

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

31525

B-215265

FILE:

DATE: June 24, 1985

MATTER OF:

Waukesha Engine Division of
Dresser Industries, Inc.

DIGEST:

1. Protest filed after closing date for receipt of best and final offers, alleging that amendment to RFP was issued to allow awardee's nonconforming initial proposal to be considered, is dismissed as untimely. Alleged impropriety was an apparent defect which was incorporated into original solicitation by amendment and, therefore, had to be protested before closing date for receipt of best and final offers. 4 C.F.R. § 21.2(b)(1) (1984).
2. Protest, alleging that certain cost items associated with awardee's proposal improperly were not considered in evaluation of proposals, is timely. Protest was filed within 10 working days after "informal conferences" between contracting agency officials and protester revealed alleged evaluation improprieties. 4 C.F.R. § 21.2(b)(2) (1984).
3. Protest that certain cost items improperly were not considered in evaluation of proposals is denied, because cost items were uncertain and difficult to estimate and, therefore, were not included in RFP's evaluation scheme.
4. Protest that awardee's proposal did not meet RFP shock testing requirement is denied because contracting agency has provided GAO with documentation which shows that awardee met shock testing requirement.
5. Issue first raised in supplemental protest letter filed approximately 4-1/2 months after initial protest letter was filed is untimely where protester has not shown that it diligently pursued information which made it aware of later-raised

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basis for protest nor has protester shown any intervening event between "informal conferences" which revealed initial bases of protest and supplemental filing which made it aware of new protest basis.

Waukesha Engine Division of Dresser Industries, Inc. (Dresser), protests award of a firm fixed-price contract to Isotta Fraschini (Isotta) by the Department of the Navy pursuant to request for proposals (RFP) No. N00024-83-R-2241(Q). The contract requires production of 24 diesel engines with related technical data and engineering services for use in mine countermeasure (MCM) class ships and contains options for an additional 24 to 32 engines. Dresser contends that award to Isotta was improper because: (1) the Navy amended the RFP after initial proposals were submitted to permit consideration of Isotta's nonconforming proposal; (2) the proposals were not evaluated in accord with the evaluation scheme set forth in the RFP; and (3) Isotta's proposed engine did not meet the RFP's shock testing or endurance acceptance requirements.

We dismiss the protest in part and deny it in part.

The RFP was issued by the Naval Sea Systems Command on August 5, 1983, for design and manufacture of low magnetic signature diesel engines suitable for installation in MCM class ships. The engines will be provided to builders of MCM class ships as government furnished equipment. Six proposals were received by the December 12 closing date for submission of initial proposals. These proposals were evaluated by the Technical Evaluation Review Panel to determine if they met the minimum acceptable characteristics specified by the RFP. As a result of the initial evaluation, two proposals were rejected as technically unacceptable, and discussions were held with the four remaining offerors, including Dresser and Isotta. During discussions two amendments to the solicitation were issued. Amendment No. 2, issued on March 2, deleted an RFP provision which basically prohibited offerors from using ferrochromium or steel mill products which contain more than three percent chromium if they are produced outside the United States and contain Rhodesian chromium. Amendment No. 3, issued March 13, incorporated a new guarantee provision, established the close of discussions, and set March 23 as the closing date for receipt of best and final offers. Best and final offers were evaluated by the Technical Evaluation Review Panel and

the Contract Award Review Panel which recommended Isotta for award because it had received the highest scores in both technical and price categories. The contract was awarded to Isotta on April 4. Dresser was debriefed by contracting officials on April 12, at which time it was informed of the reasons it was not selected for award. After informal conferences held on May 3 and 4, Dresser filed its initial protest letter in our Office on May 17.

Dresser alleges that the RFP was "rewritten" by the Navy when it issued amendment No. 2 so that Isotta's nonconforming proposal could be considered for award. Specifically, Dresser contends that the Navy deleted the RFP's prohibition on the use of ferrochromium or steel mill products containing more than three percent Rhodesian chrome because Isotta had based its initial proposal on the use of these nonconforming supplies. Dresser further argues that it and all offerors other than Isotta were prejudiced because "[t]hey were never given the opportunity to propose the (non-conforming) supplies that Isotta was later given." Dresser states that Isotta was thus able to price its proposal more cheaply because it could take advantage of a greater number of potential sources of supply.

We find this issue to be untimely. Under our Bid Protest Procedures, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested before the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(b)(1) (1984). Here, amendment No. 2 was issued on March 2 after submission of initial proposals and best and final offers were to be submitted by March 23. Accordingly, since the amendment incorporated a change which Dresser believed improper, Dresser had to file its protest on this issue by the closing date for receipt of best and final offers. However, Dresser did not file its initial protest on this apparent solicitation impropriety until May 17, or almost 2 months after the closing date for submission of best and final offers. See Defense Industries, Inc., B-202094.3, Nov. 30, 1981, 81-2 CPD ¶ 429. In any event, we fail to see how Dresser or any other offeror was prejudiced by the issuance of this amendment since all offerors were given an opportunity by the amendment to revise their initial proposals without the "Rhodesian chrome" prohibition and to include any resulting price reductions in their best and final offers. We dismiss this part of the protest.

Dresser also contends that certain costs associated with acceptance of Isotta's proposal improperly were not taken into account by the Navy's evaluators in evaluating Isotta's proposal. The first of these costs is related to the fact that, according to Dresser, Isotta's proposed engines are simply not compatible with the design of the MCM class ships on which the engines are to be installed. Dresser claims that the Navy will, therefore, have to incur as much as \$15.7 million additional costs to have the ships redesigned to fit the Isotta engines and that this redesign work will affect, at a minimum, the ships' piping, foundations, controls, cooling systems, heat recovery systems, and intake and exhaust ducting. Dresser also charges that the evaluators failed to consider the additional cost the Navy will have to incur to store spare parts for the Isotta engines. According to Dresser, in order for Isotta to achieve the very low magnetic signature requirement that is needed for MCM class ships, Isotta has specially treated all of its engine's components by a process which Isotta calls "de-perming." Dresser claims that this "de-perming" effect is quickly lost if the treated components are stored near any other parts that generate a magnetic field. Therefore, Dresser alleges that the Navy will have to spend additional money for special storage facilities to insure that all Isotta spare parts remain "de-permed" for their 20-year life expectancy. The final cost which Dresser contends should have been, but was not, considered by Navy evaluators in their evaluation of Isotta's proposal is related to certain endurance-type tests which the Navy contemplated using on the Isotta engine. According to Dresser, the Isotta engine has never been used in this type of application and has never been adequately tested to the RFP requirements, and, therefore, such testing would not have been done if award had been made to another offeror with a product with a long history of performance.

The Navy contends that this basis of protest is untimely. The Navy argues that it was clear from the RFP that the only elements of price to be evaluated were the proposed price for the basic and option quantities plus the price of 500 additional hours of engineering services. The Navy contends that Dresser is really protesting that the RFP should have included as part of its evaluation scheme the various cost factors which Dresser cites above as being associated only with Isotta's proposal. The Navy urges dismissal under section 21.2(b)(1) of our Bid Protest Procedures, supra, which requires that protests based upon alleged improprieties in a solicitation be filed prior to the closing date for receipt of initial proposals.

We do not agree with the Navy that this aspect of Dresser's protest was apparent from a reading of the RFP and therefore is untimely. Dresser clearly states in its protest correspondence that it does not suggest that other evaluation factors should have been included in the RFP's evaluation scheme. Rather, Dresser contends that, under the evaluation scheme as it was set forth in the RFP, the special costs allegedly associated with Isotta's proposal should have been included in a proper evaluation. In our opinion, this portion of Dresser's protest does not pertain to the RFP's evaluation criteria, but to the Navy's application of those criteria in the evaluation of proposals. CompuServe, B-204932, July 8, 1982, 82-2 CPD ¶ 33. Moreover, Dresser states that, at the April 12 debriefing, the Navy gave Dresser officials very few details about the Navy's evaluation methods and did not compare the Dresser and Isotta proposals. According to Dresser, it was not until "informal conferences" held on May 3 and 4, 1984, between Dresser and Navy representatives that it learned that the alleged extra costs of accepting Isotta's proposal were not considered in the evaluation process. The Navy has presented no evidence to show that Dresser should have known of this basis of protest from the debriefing and has not refuted Dresser's statement that "informal conferences" between Dresser and Navy officials led to discovery of this protest basis. Therefore, we accept as reasonable Dresser's statement that it first became aware of these alleged evaluation improprieties on May 3 and 4. See CompuCorp, B-212533, May 22, 1984, 84-1 CPD ¶ 536 at 4. Accordingly, we consider Dresser's protest of this issue, which was filed in our Office on May 17, to be timely and will consider it on its merits. 4 C.F.R. § 21.2(b)(2).

We point out that it is neither our function nor practice to conduct a de novo review of technical proposals and make an independent determination of their acceptability or relative merit. The evaluation of proposals is the function of the procuring agency, requiring the exercise of informed judgment and discretion. Our review is limited to examining whether the agency's evaluation was fair and reasonable and consistent with the stated evaluation criteria. We will question contracting officials' determinations concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations. KET, Inc., B-190983, Dec. 21, 1979, 79-2 CPD ¶ 429.

In response to Dresser's protest, we specifically requested that the Navy give us all relevant documents concerning the evaluation of proposals, including individual

evaluators' reports, the Technical Evaluation Review Panel's report, and the Contract Award Review Panel's report. The Navy gave us these documents but requested that we not release the information contained therein because the materials are "source selection sensitive." As is our practice in such circumstances, we have reviewed the source selection documents in camera and our discussion of the evaluation will be necessarily limited.

The RFP, in section M, entitled "Evaluation Factors for Award", stated:

"3. Basis for Selection

The selection will be based upon evaluation of the categories listed below. These evaluation categories relate to and are discussed further in paragraph 45, section L of this solicitation.

Category 1. Minimum Acceptable Characteristics
(Go/No Go)

Proposed engines must meet the Minimum Acceptable Characteristics of Category 1 before they will be considered for the competitive Categories 2 through 7 below. Proposed engine variations from the Minimum Acceptable Characteristics which are more favorable to the Government will be reconsidered for additional points as enhanced characteristics under Category 2, Technical. Proposed engines which do not meet the Minimum Acceptable Characteristics will not be considered further.

Category 2. Technical

Category 3. Signatures

Category 4. Logistic Support

Category 5. Interface

Category 6. Production

Category 7. Price

Proposals will be evaluated for purposes of award by adding the total price for option Item 0009 (Option C2) to the total price of the basic quantity (Alternative C). In addition, the

price of 500 additional hours of engineering services (computed on the basis of the hourly rates which the Offeror set forth in Special Provision H-6) for each calendar year listed in Special Provision H-6 shall be added to the total amount computed as discussed in the preceding sentence.

Category 7, Price, will be evaluated separately from Categories 2 through 6. Taken together, the evaluation of Categories 2 through 6, is more important than Category 7, Price.

Price, however, is more important than any single category in Categories 2 through 6. In addition, Categories 2 through 6 are arranged in descending order of importance."

In addition the RFP contained 15 pages describing in some detail the various items which proposals should address within each evaluation category and which would be evaluated in the selection process.

Dresser charges that the Navy's evaluation was improper solely because Isotta was not penalized in any way in either the technical evaluation or in terms of price evaluation for alleged additional costs associated with: (1) redesign work to make the ships compatible with Isotta's proposed engines; (2) special storage facilities for storing Isotta's spare parts; and (3) certain endurance tests on Isotta engines. We have examined the evaluation documents in camera and find that the evaluation was properly conducted in strict conformity with the criteria set forth in the RFP.

It is a fundamental principle of federal procurement law that a solicitation must be drafted in a manner that clearly informs all offerors of the evaluation factors to be used by the contracting agency so that all offerors are treated equally and are provided a common basis for submission of proposals. Data 100 Corp., B-194924, Dec. 19, 1979, 79-2 CPD ¶ 416; System Development Corp. and International Business Machines, B-204672, Mar. 9, 1982, 82-1 CPD ¶ 218 at 17. Nowhere in the RFP is there any indication that any of the alleged additional costs would be taken into account in the evaluation of proposals, and it is clear from the express language of the RFP that the Navy did not contemplate consideration of any costs other than those which

were included indirectly as part of proposed prices in the selection of a contractor for this firm fixed-price contract. The Navy reports that the costs of making the MCM ship design compatible with engines proposed by Isotta or other offerors was never "called out" in the RFP because such costs were "uncertain and difficult to estimate" at the time the evaluation was performed. In this regard, by letter of March 15, 1985, or approximately 1 year after the closing date for receipt of best and final offers, the Navy reported that the lead shipbuilding contractor had submitted an engineering change proposal in the approximate amount of \$11.7 million to cover the costs of design changes to MCM ships to accommodate the Isotta engine. However, the Navy also reported that the lead shipbuilder had not provided any documentation to support this amount and that it was negotiating to "definitize" the final amount. Further, it is not clear from the record what portion of these redesign costs are attributable solely to the use of an Isotta engine and would not be incurred if another type of engine were used instead.

We have upheld agency determinations not to include as evaluation factors cost elements which were too uncertain and difficult to estimate at the initial stages of the procurement process. See IMODCO, B-216259, Jan. 11, 1985, 85-1 CPD ¶ 32 (costs of modifying tankers allegedly associated with awardee's mooring system); Ensign Bickford Co., B-180844, Aug. 14, 1974, 74-2 CPD ¶ 97 (costs of shipping aluminum cans); Xerox Corp., B-180341, May 10, 1974, 74-1 CPD ¶ 242 (program conversion costs). Accordingly, we cannot find unreasonable the Navy's determination that potential redesign costs were too speculative to be made a part of the RFP's evaluation scheme. Nevertheless, we think it would be prudent for the Navy to determine what the redesign effort related to the use of the Isotta engine will cost before allowing Isotta to continue to perform and incur costs under its contract. In this regard, relevant protest documents have been furnished to our National Security and International Affairs Division for its review as part of an ongoing audit of the MCM program.

Concerning the protester's claim that Isotta's engines will cause the Navy to incur substantial additional costs in connection with special storage facilities, we note that the Navy has denied that any special storage facilities will be required and has provided our Office with supporting documentation for our in camera review. Concerning the protester's claim that the Navy contemplated additional endurance testing on Isotta's engine, the Navy has reported that none of the testing performed on the Isotta engine is above

and beyond that which would have been performed on any engine selected in this competition.

Dresser has not alleged any other specific deficiencies in the evaluation process. Nonetheless, we have reviewed all of the evaluation documents to insure that the evaluation was fair and conformed to the stated evaluation scheme. In particular, we point out that under the "Minimum Acceptable Characteristics" the evaluators checked to make sure that Isotta's engine met the operational and physical characteristics set forth in the RFP. The evaluators also apparently checked to make sure that Isotta's proposal provided all of the technical information required in the "Interface" and "Technical" evaluation categories and were satisfied with the information submitted. The evaluators' reports for each category, as well as the reports of the Technical Evaluation Review panel and the Contract Award Review Panel, contain detailed observations of the strengths and weaknesses of the proposals; none of these observations appears to be based upon considerations which were outside the RFP's detailed evaluation scheme. Accordingly, we deny Dresser's protest that the evaluation was improperly conducted.

Dresser next contends that Isotta's proposal was unacceptable because it did not meet the RFP's express requirement that the proposed engine must have met certain shock testing requirements or alternatively that the proposal provide substantiating documentation to show that shock test certification can be achieved by the time of delivery. The Navy contends that this protest issue should be dismissed because the protester claims that it only became aware of this basis for protest through "informal conferences," with Navy officials on May 3 and 4, 1984, but refuses to provide names or other substantiation regarding its claim. We find that this issue was timely filed because Dresser filed it within 10 working days after the "informal conferences." there is nothing in the record to show that Dresser should have been aware of this protest basis at any time before those meetings, and Dresser has provided at our request an affidavit from one of its officials to substantiate its claim that such meetings took place. We have reviewed the affidavit in camera and are satisfied as to the reasonableness of Dresser's statement that it first became aware of this basis for protest at those meetings. Accordingly, this issue was timely filed in accord with section 21.2(b)(1) of our Procedures. 4 C.F.R. § 21.2(b)(1).

The Navy has provided our Office with documentation for our in camera review which shows that Isotta's engine had

been shock tested to the Italian Navy's equivalent of the RFP-specified requirement and was so successful in passing early tests that the testing procedure was halted before tests were completed. During discussions the Navy asked Isotta to provide plans to complete shock testing, Isotta complied, and Navy evaluators were satisfied that testing could be completed before delivery was due. Accordingly, we are satisfied from the record provided that the Navy evaluators' judgment in this regard was reasonable. Therefore, this issue of the protest is denied.

Finally, Dresser filed a supplemental protest letter in our Office on October 4, 1984, in which it raised for the first time a new, independent basis of protest. Dresser alleges that Isotta's proposed engine did not meet the RFP's mandatory endurance acceptance requirements. The Navy argues that this protest issue is untimely. We agree. This new issue must independently satisfy our timeliness requirements. Le-Gals, Inc., B-212531.2, Oct. 5, 1984, 84-2 CPD ¶ 386. Dresser has alleged but not shown that it first became aware of this alleged impropriety less than 10 working days prior to filing its supplemental letter in our Office. See CompuCorp, B-212533, supra, at 5. Furthermore, we have held that protesters have a duty to diligently pursue their protests by seeking within a reasonable time information which reveals the basis for protest. See National Systems Management Corp., B-198811, Oct. 10, 1980, 80-2 CPD ¶ 268; National Council of Senior Citizens, Inc., B-196723, Feb. 1, 1980, 80-1 CPD ¶ 87. Dresser has not shown that it diligently pursued the information which made it aware of this basis of protest. Moreover, Dresser has not shown any intervening event between the May 3 and 4 "informal conferences" which led it to its earlier-raised protest issues and its supplemental filing. Accordingly, since this issue was filed more than 5 months after the "informal conferences" of May 3 and 4 which made Dresser aware of the earlier-filed bases of protest, and approximately 4-1/2 months after the initial protest was filed, we find this issue to be untimely. We therefore dismiss the protest on this issue.

We dismiss the protest in part and deny it in part.

Harry R. Van Cleve
Harry R. Van Cleve
General Counsel